

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

In the Matter of )  
NATIONWIDE PROGRAMMATIC )  
AGREEMENT REGARDING THE )  
SECTION 106 NATIONAL HISTORIC )  
PRESERVATION ACT REVIEW PROCESS )

WT Docket No. 03-128

To: The Commission

**COMMENTS OF AT&T WIRELESS SERVICES, INC.**

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AT&T Wireless Services, Inc. ("AWS") hereby submits comments in support of the National Historic Preservation Act ("NHPA") Notice of Proposed Rulemaking ("NPRM") that addresses the draft nationwide programmatic agreement ("Draft NPA") for Section 106 historic preservation review of Federal Communication Commission ("FCC" or "Commission") undertakings.<sup>1</sup>

**I. Introduction and Summary**

For the past three years, AWS has worked closely with the FCC and others in the Telecommunications Working Group ("TWG") to develop programmatic agreements that streamline the Section 106 process for wireless telecommunications projects. The notably successful Nationwide Collocation Programmatic Agreement ("NCPA" or "Collocation Agreement") was the product of months of intensive negotiations in the TWG.

Based on the work of the TWG, the Commission has proposed the Draft NPA, stating that it "(1) excludes from Section 106 review certain Undertakings involving construction

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<sup>1</sup> See Notice of Proposed Rulemaking, *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, WT Docket No. 03-128, FCC 03-125 (rel. June 9, 2003) ("NPRM").

and modification of Facilities, and (2) streamlines and tailors the Section 106 review process for other Undertakings involving the construction and modification of Facilities.”<sup>2</sup>

These comments are intended to identify the issues that AWS believes must be addressed if the Draft NPA is to achieve the goals set by the TWG. In summary, AWS supports the exclusion of any undertaking that will result in the elimination of unnecessary Section 106 review. With minor revisions and clarifications, AWS supports the six excluded undertakings identified in the Draft NPA. AWS urges the Commission to apply an appropriate analysis of visual effects and the area of potential effect (“APE”) under the rules of the Advisory Council on Historic Preservation (“ACHP”) and the guidance provided in the National Register of Historic Places (“National Register”).

AWS also believes that Section 106 review appropriately applies only to properties determined eligible for, or listed in, the National Register. AWS recommends that the NPA clarify that any undertaking determined by the applicant or the Commission to have a "conditional no adverse effect" does not require preparation of an EA. Finally, AWS suggests revisions to discrete provisions of the Draft NPA.

As the Commission is aware, mobile wireless services have rapidly evolved into an indispensable, crucially important network of services upon which more and more of our country's citizens depend, and without which our commerce, public safety and homeland security would be impaired. Therefore, this agreement presents a rare opportunity to benefit our most important domestic interests by reducing unnecessary regulatory burdens, while maintaining the highest level of federal preservation for historic properties.

AWS is confident that the Draft NPA, with the revisions suggested herein, will be a landmark policy achievement for the Commission, benefiting the wireless industry and the historic preservation community alike.

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<sup>2</sup> Draft NPA at Section I.A.

## II. Discussion

### A. Excluded Undertakings

AWS commends the efforts of the Commission and other parties in the TWG to take necessary steps toward streamlining the process of Section 106 review. Critical to this important goal is identifying the categories of projects that should be excluded from Section 106 review because they are unlikely to affect historic properties. The exclusion from Section 106 review of such projects is expressly permitted under the rules of the ACHP and advances the important streamlining goal of regulating only when needed to protect historic resources.<sup>3</sup> Moreover, because the vast majority of Section 106 tower reviews produce findings of no effect or no adverse effect,<sup>4</sup> progress toward this goal will ensure that the limited compliance-related resources available to both federal and state regulators are available for the small number of communications projects that truly have a significant effect on historic properties.

Eliminating unnecessary regulation promotes the health of the entire industry and therefore homeland security by enabling robust wireless services to be made available to consumers and public safety entities alike. To be effective, however, exclusions must be clear, objective and easily implemented. AWS recognizes that many of the exclusions proposed in the TWG have been modified from their original form and, in some cases, have

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<sup>3</sup> Section 214 of the NHPA grants the Advisory Council on Historic Preservation ("ACHP") authority, with the concurrence of the Secretary of the Interior, to promulgate regulations "under which Federal programs or undertakings may be exempted from any or all of the requirements of [the NHPA]." 16 U.S.C. § 470v. The ACHP exercised this authority in promulgating ACHP Rule 800.14(c), which permits the FCC to exempt any undertaking from Section 106 review, provided three criteria are met: (i) the action qualifies as an undertaking; (ii) the potential effects upon historic properties are foreseeable and likely to be minimal or not adverse; and (iii) the exclusion is consistent with the purposes of the NHPA. 36 C.F.R. § 800.14(c).

<sup>4</sup> In a 2002 meeting of the TWG, the Ohio State Historic Preservation Officer ("SHPO") reported on a survey their office had performed showing that more than 97% of Section 106 reviews of communications towers in that state resulted in findings of no effect. Other SHPO staff reported similar rates of Section 106 review without adverse effect findings in their states.

been either substantially limited or made quite complex. While AWS does not necessarily agree with all of these modifications, any exclusions that will, in the end, eliminate unnecessary review and reduce resources expended by regulators and industry alike should be retained.

Section III.A of the Draft NPA proposes to exclude from Section 106 review the following six categories of undertakings identified as not likely to adversely affect historic properties:<sup>5</sup>

- modifications that do not substantially increase the size of an existing tower ("modification exclusion");
- construction of a replacement tower that does not substantially increase the size of the existing tower or expand the property boundary ("replacement tower exclusion");
- construction of temporary wireless facilities ("temporary facilities exclusion");
- construction of facilities less than 400 feet in height on land used for industrial, commercial or government-office purposes ("industrial area exclusion");
- construction of facilities less than 400 feet in height located near government rights-of-way, highways or railroad corridors ("corridor exclusion"); and
- construction of facilities in an area previously designated as an exclusion zone by the SHPO/THPO ("SHPO designation exclusion").

As an initial matter, AWS notes that the "modification" (III.A.1) exclusion is not, in fact, an undertaking under the ACHP rules and should be removed from the exclusion section of the Draft NPA.<sup>6</sup> For the purposes of the Draft NPA, the only activities that subject the Commission to Section 106 are those "requiring a Federal permit, license or approval." Modifications to Towers that do not involve collocations are not subject to the "permit,

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<sup>5</sup> Draft NPA at Section III.A.

<sup>6</sup> The ACHP defines an "Undertaking" as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; those requiring a Federal permit, license or approval; and those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency." 36 C.F.R. § 800.16(y).

license or approval" of the Commission, and therefore, are not undertakings. As such, modifications are not subject to Section 106 review and need not be "excluded."

If the Commission nevertheless determines that these types of modifications qualify as undertakings, AWS urges the Commission to exclude such modifications as currently proposed, with one clarification. The exclusion should make clear that it applies to modifications undertaken not in connection with a collocation, and not requiring separate FCC authorization.

AWS supports without revision the "replacement tower" (III.A.2) and "temporary facilities" (III.A.3) exclusions. Both exclusions advance the legitimate goals of streamlining the Section 106 review process without compromising the need to protect historic resources. In addition, with one exception, these exclusions are drafted clearly and in a way that will ensure that they are applied as intended. AWS suggests clarifying the replacement tower exclusion so that it reads "does not expand the boundaries of the leased or owned property on which surrounding the tower rests." This revision more closely matches the intended meaning of the sentence, which was otherwise unclear and could apply to any surrounding project without limit.

AWS also supports the "SHPO designation" exclusion (III.A.6) without revision. This exclusion could be a useful tool for SHPOs to help channel or direct tower development away from certain sensitive areas. AWS hopes that SHPOs will recognize the value of this exclusion and employ it accordingly.

With slight revisions, AWS generally supports the industrial area (III.A.4) and corridor exclusions (III.A.5), including the definition of "previously disturbed ground" set forth in Section VI.C.4 and referenced in both exclusions. Both exclusions are conceptually sound and can be implemented fairly and effectively if the Commission clarifies the scope

and applicability of the exclusions. AWS' proposed revisions to the industrial area exclusion, which are intended to provide this clarity, are as follows:

4. Construction of a Facility 400 feet or less in overall height above ground level on a property that is in actual use ~~solely~~ **primarily** for industrial, commercial, and/or government-office purposes, **or is surrounded by property in actual use for such purposes,** and that occupies an area of 10,000 square feet or more, or that together with adjacent industrial, commercial, and/or government-office properties occupies an area of 10,000 square feet or more, where no structure 45 years or older is located within 200 feet of the proposed Facility, and where all areas to be excavated will be located on ground that has been previously disturbed as defined in Section VI.C.4 below.

Similarly, the corridor exclusion (III.A.5) should be revised to make clear that it applies to railway corridors in active use for all types of trains, not just passenger trains, and to clarify certain ambiguous language. No logical basis exists for limiting the railway corridor exclusion just to passenger trains. AWS' proposed revisions to the corridor exclusion are as follows:

5. Construction of a Facility 400 feet or less in overall height above ground level located in or within 200 feet of the outer boundary of any of the following, and where all areas to be excavated will be located on ground that has been previously disturbed as defined in Section VI.C.4 below.

a. A right-of-way designated by a government for the location of communications Towers or above-ground utility transmission lines and associated structures and equipment, and in active use for such purpose;

b. **The right-of-way of an** ~~An~~ existing limited access Interstate Highway with a speed limit of 55 MPH or higher; or

c. **The right-of-way of a** ~~A~~ railway corridor in active use for ~~passenger trains~~ **railway traffic**;

However, an Undertaking shall not be excluded from review under this provision if (1) the existing highway, railway line, or communications structure is included in the National Register and the setting **including the excluded area** or other visual element **including such area** is identified as a character-defining feature of eligibility on the National Register nomination; (2) the proposed Facility lies within 200 feet of any other structure that is 45 years or older; or (3) the proposed

Facility lies within 3/4 mile of and is visible from a unit of the National Park System that is listed or eligible for listing in the National Register, or a National Historic Landmark.

## **B. Visual Effects**

Compared to many other kinds of federal undertakings subject to Section 106 review, wireless telecommunications projects present relatively little potential to cause direct physical effects, and a much greater potential for what is called visual effects. Indeed, although only a very small number of tower facilities are ever ultimately determined to cause an adverse effect of any kind,<sup>7</sup> most reviews focus almost exclusively on the alleged "visual impacts," as opposed to physical impacts from such facilities. As the Commission is well aware, the problem of identifying, assessing, and mitigating alleged visual effects consume the vast majority of Section 106 compliance resources of both regulated industry and federal and state regulators. AWS believes that much of this effort and expense is unnecessary.

In fact, most wireless facilities have only a very limited ability to cause visual adverse effects to historic properties. Most of the so-called "visual effects" from towers are merely aesthetic effects, involving subjective judgments of taste and preference, but not effects to historic properties as defined under Section 106. Such effects, operating alone, may alter the mood or perception of a viewer, but they cannot "affect" or alter a property itself unless accompanied by some other effect that physically alters the historic property.<sup>8</sup> This critical point must be clarified in the final NPA.

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<sup>7</sup> See *supra* note 4 and accompanying text.

<sup>8</sup> As aesthetics are subject to the personal tastes and whims of a community, their regulation has traditionally (and appropriately) been left to local zoning boards. In fact, the FCC has adopted a policy of deferring to state and local land use authorities on issues concerning the aesthetic effects of proposed facilities. See, e.g., *Amendment of Environmental Rules in Response to New Regulations Issued by the Council on Environmental Quality*, Gen. Docket 79-163, Report and Order, 60 Rad. Reg. 2d 13, ¶17 (1986) ("We would also note that aesthetic concerns may more appropriately be resolved by local, state, regional or local [sic] land use authorities. Those authorities can better handle questions given their experience and familiarity with land use values.").

The rules of the ACHP define the term “effect” as an “alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register.”<sup>9</sup> The same rules define an “adverse effect” as one that alters a qualifying characteristic of a historic property “in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association.”<sup>10</sup> Thus, it is clear that under Section 106, any finding of an effect or an adverse effect from an undertaking, must be based on an alteration of one or more National Register qualifying characteristics of a historic property.

### **1. Characteristics of Eligibility for the National Register**

The two necessary qualities for eligibility are significance and integrity. That is, for a property to qualify for the National Register, it must (1) be associated with an important historic context; and (2) it must retain the historic integrity of those features necessary to convey the property's significance.<sup>11</sup> The National Register's four criteria of significance define the association that must exist between a historic property and historically significant persons, events, characteristics or information.<sup>12</sup> A property's integrity is measured in one or

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<sup>9</sup> 36 C.F.R. § 800.16(i)

<sup>10</sup> 36 C.F.R. § 800.5(a)(1). The Draft NPA instructs applicants to evaluate effects and use the definition provided by this section as guidance. Draft NPA at Section VI.E.1.

<sup>11</sup> United States Department of the Interior, National Park Service, National Register Bulletin 15, “How to Apply the National Register Criteria for Evaluation,” (Revised 1997) *available at* <http://www.cr.nps.gov/nr/publications/bulletins/nrb15/>, (Revised for the Internet, 1995) (“*National Register Bulletin 15*”) at 3.

<sup>12</sup> The National Register defines the four criteria for evaluation as follows: “The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association, and: A. That are associated with events that have made a significant contribution to the broad patterns of our history; or B. That are associated with the lives of persons significant in our past; or C. That embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack

more of seven aspects of its physical features, including its: (1) location; (2) design; (3) setting; (4) materials; (5) workmanship; (6) feeling; and (7) association.

Because the presence of a tower facility will never alter the relationship of a property to a significant person or event, as opposed to setting, feeling, etc., visual effects from a tower obviously cannot alter any of a property's criteria of significance. Any assessment of potential effects must always focus on the tower's potential effect on a property's integrity. Given the nature of visual effects, and because mere visibility of a tower has little or no ability to affect a property's design, materials, workmanship or association, the assessment will necessarily focus on the integrity of the property's setting and feeling.

The National Register explains that that "[t]he evaluation of integrity is sometimes a subjective judgment, but it *must always be grounded in an understanding of a property's physical features* and how they relate to its significance."<sup>13</sup> Therefore, because a historic property's historic integrity must be "grounded" in the physical characteristics of that property, the only effects that may be considered under Section 106 are those that alter one or more physical characteristics of the property itself, in this case, the characteristics of a property's physical setting and feeling.

The National Register defines feeling as "a property's expression of the aesthetic or historic sense of a particular period of time. It results from the presence of physical features that, taken together, convey the property's historic character."<sup>14</sup> Thus, a tower project would affect a property's feeling only if it inhibited a property's ability to express its own historic character.

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individual distinction; or D. That have yielded, or may be likely to yield, information important in prehistory or history." *National Register Bulletin 15* at 2; see also 36 C.F.R. § 60.4.

<sup>13</sup> *National Register Bulletin 15* at 44 (emphasis supplied).

<sup>14</sup> *Id.* at 45.

The National Register defines setting as "the physical environment of a historic property."<sup>15</sup> Where integrity of setting is an element of National Register eligibility, however, the relevant physical environment is not the same as the "viewscape" from the property. The evaluation of setting for eligibility purposes is limited to a specific geographic area. The limits of this area are specified in its nomination by a description of the property's boundary of historic significance.<sup>16</sup> Boundaries should encompass all the resources that contribute to the property's historic significance.<sup>17</sup> Therefore, it is clear that the protected

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<sup>15</sup> *Id.* Whereas location refers to the specific place where a property was built or an event occurred, setting refers to the *character* of the place in which the property played its historic role. It involves *how*, not just *where*, the property is situated and its relationship to surrounding features and open space.

<sup>16</sup> United States Department of the Interior, National Park Service, Form 10-300, "National Register of Historic Places Inventory – Nomination Form," Section 10 – "Geographical Data" ("*Nomination Form*") (providing requests for acreage and both the coordinates and a verbal boundary description); *see also* United States Department of the Interior, National Park Service, National Register Bulletin "Defining Boundaries for National Register Properties," at 1 ("*Defining Boundaries Bulletin*") ("Among the decisions a preparer must make is the selection of the property's boundaries: in addition to establishing the significance and integrity of a property, the physical location and extent of the property are defined as part of the documentation."); United States Department of the Interior, National Park Service, National Register Bulletin 16A, "Getting Started" at § III, *available at* [http://www.cr.nps.gov/nr/publications/bulletins/nrb16a/nrb16a\\_III.htm#geographical](http://www.cr.nps.gov/nr/publications/bulletins/nrb16a/nrb16a_III.htm#geographical) ("*Completing NR Form Bulletin*") ("Carefully select boundaries to encompass, but not to exceed, the full extent of the significant resources and land areas making up the property. The area to be registered should be large enough to include all historic features of the property, but should not include 'buffer zones' or acreage not directly contributing to the significance of the property. Leave out peripheral areas of the property that no longer retain integrity, due to subdivision, development, or other changes.").

<sup>17</sup> *Defining Boundaries Bulletin* at 1. Under the ACHP's Section 106 rules, the boundary specified in a National Register nomination is not necessarily considered definitive if the nomination is old or if the assessment of the boundaries was originally uninformed by modern standards or is otherwise incomplete. *See* 36 C.F.R. § 800.4(c)(1) ("The passage of time, changing perceptions of significance, or incomplete prior evaluations may require the agency official to reevaluate properties previously determined eligible or ineligible."). Historic boundaries do not necessarily track legal boundaries of a property's ownership. Extension of a boundary of historic significance beyond a property's immediate setting, however, is permitted only in cases where "appropriate correspondence [exists] between the factors that contribute to the property's significance and the physical extent of the property." *Defining Boundaries Bulletin* at 2.

setting of any historic property is the setting within the property's boundary of historic significance.

## **2. Appropriate Consideration of Visual Effects Under Section 106**

For purposes of assessing visual effects, the Draft NPA currently defines the APE of a communications facility based on the tower's height and its proximity to a historic property.<sup>18</sup> This definition, however, fails to recognize that visual effects under Section 106 must alter physical features of a historic property, and the role that a property's boundary of historic significance plays in the assessment.

The physical environment of setting, and the physical features that generate feeling, are considered for a property's eligibility for the National Register only if they are contained within the property's boundary of historic significance. The extent of this area is specified in a listed property's nomination to the National Register.<sup>19</sup> As noted above, the National Register's guidance also explains that boundaries should encompass all the resources that contribute to the property's significance.<sup>20</sup>

Under this guidance, therefore, an adverse effect to the setting or feeling of a property exists only if there is an alteration and diminishment of the physical environment or physical

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<sup>18</sup> See Draft NPA at Section VI.B.2.a.

<sup>19</sup> See *Nomination Form*, Section 10 – “Geographical Data” (requesting acreage and both the coordinates and a verbal boundary description); see also *Defining Boundaries Bulletin* at 1; *Completing NR Form Bulletin* at § III.

<sup>20</sup> *Defining Boundaries Bulletin* at 1. In designating such boundaries, nominators should: “Select boundaries that define the limits of the eligible resources. Such resources usually encompass the immediate surroundings and encompass the appropriate setting. However, exclude additional, peripheral areas that do not directly contribute to the property's significance as buffer or as open space to separate the property from surrounding areas. . . .” *Id.* at 2 (emphasis supplied). This guidance also provides: “Boundaries should include surrounding land that contributes to the significance of the resources by functioning as the setting. This setting is an integral part of the eligible property and should be identified *when boundaries are selected*. For example, do not limit the property to the footprint of the building, but include its yard or grounds. . . .” *Id.* at 3 (emphasis added).

features within the property's boundary of historic significance as defined in the National Register nomination form.<sup>21</sup>

Since alteration and diminishment of the physical environment or physical features are the relevant focus of a proper effects analysis, the most logical presumed APE for any communications project would typically be the area where the project may cause a physical alteration of any historic property. In the case of virtually every wireless facility, the only areas where a tower could be said to potentially be able to physically alter the historic property's setting or feeling would be limited to the footprint of the tower and its supporting facilities, any area of associated excavation or earth disturbance, and those close-in areas from which a tower might inhibit a historic property's ability to convey its own significance.

For a project located outside of the boundary of a historic property, there would seem to be only a very limited number of ways to visually affect or alter physical characteristics of the property in such a way as to inhibit its ability to convey its own historic significance. One way might be if the tower would cast a shadow that alters the physical view of the property. Where integrity of feeling is a qualifying characteristic (the property's ability to evoke a feeling of a particular time and place) a tower blocking the view of such property from the only, or most important, vantage point might conceivably create such an effect.

An APE limited to the area of ground disturbance would take into account almost all possibilities of physical alteration. To account for the rare case where a historic property is not physically impacted by construction, but is near enough that the tower might prevent the

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<sup>21</sup> As previously noted, the ACHP's Section 106 rules indicate, however, that the boundary specified in a National Register nomination is not necessarily considered final in all cases. *See supra* note 17. Furthermore, the National Park Service's ("NPS") rules list several justifications for updating a historic property's boundary, including discovery of an area of additional historic significance. *See* 36 C.F.R. § 60.14(a)(2) ("No enlargement of a boundary should be recommended unless the additional area possesses previously unrecognized significance in American history, architecture, archeology, engineering or culture.") Thus, the NPS rules further underscore that historically significant areas should be contained within a historic property's listed boundary.

property from conveying its historic significance, the APE might also include a limited area around the tower site, no more than a few hundred feet in radius.

Once the area of potential physical alteration is known, the historic property identification effort should be limited to determining if the boundary of any nearby historic property includes some part of the tower project's footprint. Mere visibility of the proposed tower, as so often measured by balloon tests and the like, should be irrelevant to the process of effects consideration, unless such visibility is accompanied by physical presence within the boundary of a historic property, or so near that the tower causes a virtual physical effect that denies a property's historic feeling where that is a defining characteristic of eligibility.<sup>22</sup>

Such an approach would of course generate significantly smaller presumed APEs than those proposed in the NPRM, saving millions in compliance costs to industry, and avoiding much of the unnecessary review imposed on SHPOs and the Commission. Nevertheless, this approach is sound and grounded in the clear guidance of the ACHP's rules and the authoritative guidance from the National Register.

AWS urges the Commission to apply an appropriate analysis of visual effects and APE under the ACHP's rules and the National Register's guidance in order to change and improve this crucially important section of the Draft NPA. Such a change, though very different from the approach developed by the TWG, is not merely legally supported, but is in fact legally required. Clarification and reconfirmation of this area is therefore essential to the development of a successful and legally sustainable programmatic agreement.

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<sup>22</sup> See Letter to Mr. William J. Sill, Wilkinson Barker Knauer, LLP, from Jeffrey S. Steinberg, Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau, *Re: Section 106 Review of an FCC Undertaking, FCC Licensee/Applicant: Syracuse SMSA Limited Partnership (Verizon Wireless), Location of Project: Woodfield Road site near Cazenovia, New York, FCC Ref. No.: 2000003061*, 18 FCC Rcd 3540 (WTB 2003) (finding no adverse effect to a historic property's setting, due to tower's physical characteristics, partially shielded view, distance of tower from property's boundary of historic significance, and presence of other modern constructions).

AWS proposes to achieve this clarification and reconfirmation by revising Section VI.B.2.a as follows:

a. **To be considered under Section 106 and this agreement, visual effects from a tower must alter one or more physical characteristics of a Historic Property that qualify that property for the National Register. Mere visibility of a Tower or Facility, without alteration of a qualifying characteristic of a historic property, cannot be an effect or an adverse effect under Section 106. Ordinarily, for example, to alter a characteristic of integrity of a historic property, such as its setting,<sup>23</sup> a tower or antenna would have to be physically located on or within a property's boundary of historic significance. As another example, to alter a historic property's integrity of feeling,<sup>24</sup> the tower or antenna would have to prevent or inhibit the physical features of that property from expressing or conveying a sense of a particular period of time. Accordingly, visual effects from a tower or antenna will only be considered under Section 106 when the physical footprint or area of ground disturbance of the project is on or in the boundary of a historic property, or where the Facility is so situated next to a historic property that it substantially prevents or inhibits that property from conveying a sense of a particular time and place, when such feeling is a characteristic of the property's eligibility for the National Register.**

~~Unless otherwise established in consultation with the SHPO/THPO, the presumed APE for visual effects for the construction of new Facilities is the area from which the tower will be visible:~~

- ~~1) Within a half mile of the proposed tower, if the proposed tower is 200 feet or less in overall height;~~
- ~~2) Within 3/4 mile of the proposed tower, if the proposed tower is more than 200 feet but no more than 400 feet in overall height;~~
- ~~3) Within 1 1/2 miles of the proposed tower, if the proposed tower is more than 400 feet in overall height.~~

### C. Eligible Properties

Although the first whereas clause of the Draft NPA states that Section 106 requires federal agencies to take into account the effects of certain Undertakings "included in or

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<sup>23</sup> As previously noted, according to the National Register, setting is one of seven aspects of integrity that must be present to qualify a property for the National Register. Setting is defined as the "physical environment of a historic property." *National Register Bulletin 15* at 45.

<sup>24</sup> As previously noted, feeling is defined as "a property's expression of the aesthetic or historic sense of a particular period of time." *Id.* at 45.

eligible for inclusion in the National Register,” AWS does not concede that a Section 106 review appropriately applies to properties that have not been expressly “determined eligible” for inclusion in the National Register.

The legislative history of the 1976 amendments to Section 106 of the NHPA makes clear that the meaning of the terms "eligible for inclusion in" as used in the NHPA and "determined eligible" in Section 101(d)(6)(A) require consultation of properties that have been determined eligible by the Department of the Interior. The legislative history suggests that in using the phrase "determined eligible," Congress intended to further the principle that consultation under the NHPA was required for (1) properties already listed on the National Register or (2) properties determined eligible for listing by the Secretary of the Interior.<sup>25</sup> Federal Courts too have recognized that although Congress' 1976 amendments to the NHPA extended coverage to "eligible" properties, the intent of the Act continued only to "afford some measure of protection to properties on which there has been some determination of eligibility for inclusion on the National Register."<sup>26</sup>

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<sup>25</sup> In adding the "eligible for inclusion" language to the NHPA in 1976, Congress made clear that the language was a "housekeeping amendment" and covered only properties "determined to be eligible for inclusion in the National Register." *See* S. Rep. No. 94-367, at 13 (1975), *reprinted in* 1976 U.S.C.C.A.N. 2442, 2450. Furthermore, the NPS rules explain that "[t]he National Register is an *authoritative* guide to be used by Federal, State, and local governments, private groups and citizens to identify the Nation's cultural resources and *to indicate what properties should be considered for protection from destruction or impairment.*" 36 C.F.R. § 60.2 (emphasis supplied). Thus, under the Secretary's rules, the National Register presents the universe of those properties to be protected under the preservation laws.

<sup>26</sup> *See Birmingham v. General Services Admin.*, 497 F. Supp. 1377, 1388 n.22 (N.D. Ala. 1980) ("[a] literal construction of the phrase 'eligible for inclusion in the National Register' would, under broadly stated criteria for eligibility . . . lead almost inescapably to the conclusion that every building over fifty years old in this country is eligible for inclusion on the Register."). *See also Committee to Save the Fox Building v. Birmingham Branch of the Federal Reserve Bank of Atlanta*, 497 F. Supp. 504, 512 (N.D. Ala. 1980) (finding property eligible under National Register criteria, but concluding no agency had determined that the building was eligible). A number of federal decisions rely on the meaning of the ACHP's regulations in finding that Section 106 applies to properties that meet the criteria without an official determination, however, these courts do not address the meaning of the term "eligible for inclusion in" in the context of its legislative history.

Under the regulations of the NPS, a bureau of the Department of the Interior, it is the role of the Keeper of the National Register to determine the eligibility of a property for inclusion on the National Register.<sup>27</sup> No other entity can make such determinations. Indeed, the ACHP has clarified that its rules do not grant Indian tribes the de facto ability to designate properties subject to NHPA, as the Keeper of the National Register makes the ultimate determination.<sup>28</sup> Accordingly, only those properties "determined eligible" for inclusion in the National Register are subject to Section 106 review. All other properties fall outside the purview of Section 106 and should not be subject to the NPA.

#### **D. Conditional No Adverse Effect**

Section I.E should be revised to clarify that any undertaking determined by the applicant or the Commission to have a "conditional no adverse effect" does not require preparation of an EA. This clarification is consistent with Section I.E as currently drafted, but necessary to avoid confusion on the part of applicants. The proposed revision should be implemented as follows:

I.E. This Nationwide Agreement governs only review of Undertakings under Section 106 of the NHPA. Applicants completing the Section 106 review process under the terms of this Nationwide Agreement may not initiate construction without

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*See, e.g., Boyd v. Roland*, 789 F.2d 347, 350 (5<sup>th</sup> Cir. 1986); *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1437 (C.D. Cal. 1985).

<sup>27</sup> See 36 C.F.R. § 60.3(f) (defining "Keeper of the National Register" as "the individual who has been delegated the authority by NPS to list properties and determine their eligibility for the National Register."); 36 C.F.R. § 63.2 (setting forth process for how a federal agency can request a formal determination of eligibility from the Department of the Interior); 36 C.F.R. § 63.3 (stating that even when the federal agency and SHPO agree on the eligibility of a property, the Keeper may inform them that the property has not been "accurately defined and evaluated" therefore they may only consider the property "eligible" for purposes of obtaining comments from the Advisory Council).

<sup>28</sup> See Protection of Historic Properties, 65 Fed. Reg. 77,698, 77,706 (Dec. 12, 2000) (later codified at 36 C.F.R. Part 800) ("The fact that a Tribe attaches religious and cultural significance to [properties] does not make them 'historic,' but neither does it preclude them from meeting the National Register criteria. The Federal Agency makes the determination of eligibility, and disputes are ultimately resolved by the Keeper based on the secular National Register criteria.").

completing any environmental review that is otherwise required for effects other than historic preservation under the Commission's rules (*See* 47 C.F.R. §§ 1.1301-1.1319). Completion of the Section 106 review process under this Nationwide Agreement satisfies an Applicant's obligations under the Commission's rules with respect to Historic Properties, except for Undertakings that have been determined to have an adverse effect on Historic Properties and that therefore require preparation and filing of an Environmental Assessment (*See* 47 C.F.R. § 1.1307(a)(4)). Any Undertaking determined by the Applicant or the Commission to have a "conditional no adverse effect" does not require preparation of an EA.

#### E. Other Issues

Briefly, with respect to other provisions of the Draft NPA, AWS suggests the following modifications and revisions:

- 1) The last sentence of Section II.A.1 ("Antenna") should be revised as follows: "For purposes of this Nationwide Programmatic Agreement, the term Antenna **refers to an intentional radiator and** does not include unintentional radiators, mobile stations, or devices authorized under Part 15 of the Commission's rules."
- 2) Section VII.A.4 should be revised to specify the exact time frame within which a SHPO/THPO must return an Applicant's Submission Packet after determining that it is inadequate. AWS suggests 7 days: "If the SHPO/THPO determines that the Applicant's Submission Packet is inadequate, the SHPO/THPO will ~~immediately~~ return it to the Applicant **within 7 days of the determination** with a description of any deficiencies."
- 3) Section VII.A.4 should be clarified as follows: "If the Applicant forwards to the SHPO/THPO a comment or objection, in accordance with Section V.F, more than 25 but less than 31 days following ~~its initial submission~~ **receipt of the comment or objection by the Applicant**, the SHPO/THPO shall have five calendar days to consider such comment or objection before the Section 106 process is complete or the matter may be submitted to the Commission."
- 4) The Draft NPA does not currently indicate when written notice is considered effective. AWS suggests a clarification that written notice is effective upon mailing.
- 5) Section VII.B.2 should be revised to remove the phrase "no Historic Properties exist within the APE and" as follows: "If the SHPO/THPO does not provide written notice to the Applicant that it agrees or disagrees with the Applicant's determination of no Historic Properties affected within 30 days following receipt of a complete Submission Packet, it is deemed that ~~no Historic Properties exist within the APE and~~ the Undertaking will have no effect on Historic Properties."

The Section 106 process is then complete and the Applicant may proceed with the project, unless further processing for reasons other than Section 106 is required.”

- 6) Section VII.D.1 should be revised to include an Applicant’s option to abandon a given site if an Undertaking will have an adverse effect: “If the Applicant determines at any stage in the process that an Undertaking would have an adverse effect on Historic Properties with the APE(s), or if the Commission so finds, the Applicant shall submit to the SHPO/THPO a plan designed to avoid, minimize, or mitigate the adverse effect. **In the alternative, the Applicant may abandon the site.**”
- 7) Section X.B should be revised to specify the threshold that must be met before the Commission will issue a “stop work” order. AWS suggests that to justify a “stop work” order a complaint must describe and support a colorable and sufficient allegation of a specific adverse effect on a listed or eligible property. All complaints that do not meet this standard can be referred to the carrier for a standard response in due time, as in the case of informal complaints about service.

### III. Conclusion

For the reasons stated above, AWS urges the Commission to adopt the Draft NPA with the modifications and revisions discussed herein.

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